

In the Matter of Richard Hopkins, Assistant Crew Supervisor Highway Construction and Bridges (PS9237T), Department of Transportation
DOP Docket No. 2004-3457
(Merit System Board, decided August 11, 2004)

Richard Hopkins requests a make-up of the promotional examination for Assistant Crew Supervisor Highway Construction and Bridges (PS9237T), Department of Transportation.

By way of background, the subject promotional examination was conducted on February 19, 2004 as a written multiple-choice examination. Candidates were required to achieve a raw score of at least 38 in order to pass the examination with a percentage average score of 70. Mr. Hopkins achieved a raw score of 29 and did not pass the examination. A total of 32 employees applied for the subject examination that resulted in an employment roster of 10 eligibles with an expiration date of March 24, 2007. It is noted that that one permanent appointment has been made and two certifications issued where the appellant indicated employment preference were placed on hold pending the outcome of this appeal. It is further noted that Mr. Hopkins has been serving provisionally in the subject title since May 2003.

In an appeal filed approximately six weeks after the examination, Mr. Hopkins states that he received a notice dated March 17, 2004 indicating that he failed to achieve a passing score, and that he was appealing the determination because he was supposed to have a reader present due to his medical condition that impacts his comprehension. The appellant maintains that he filed the necessary documentation to request a reader, including documentation regarding his condition. Moreover, he asserts that he contacted the Information Center prior to taking the examination and was informed that it had not received any indication of a decision regarding his request for an accommodation, but that he should be receiving something shortly. Mr. Hopkins states that he appeared for the examination on February 19, 2004 as scheduled and was shocked to find out there was not a reader present to assist him with the interpretation of the questions. Apparently, there was no documentation at the examination center regarding the appellant's accommodation and he states that the Center Supervisor contacted the DOP to obtain any relevant information. However, since it was after 6:00 p.m., no information was available from the DOP. Mr. Hopkins explains that he was advised he could "sign off" his right to have a reader present and take the examination or he could request a make-up examination. As such, under the pressure of possibly losing the opportunity

for advancement, Mr. Hopkins states he took the test even though he was unable to read the examination properly.

Gregory Vida, Director, Division of Human Resources, Department of Transportation, submitted a letter in support of this appeal. Mr. Vida states that Mr. Hopkins elected to participate in the examination without the benefit of a reader because the DOP had not acted on his request for an accommodation. Under these circumstances, Mr. Vida does not believe that the test results accurately reflect Mr. Hopkins' abilities.

It is noted for the record that Mr. Hopkins requested on his application for the subject examination that he would need Americans with Disabilities Act (ADA) Assistance. The record also reflects that Mr. Hopkins submitted documentation regarding his condition and a request for a reader to the DOP in an envelope postmarked January 12, 2004. Additionally, the record demonstrates that a Special Notice was sent to Mr. Hopkins dated February 6, 2004 for a different promotional examination, Crew Supervisor Building Maintenance Programs (PS0429T), that requested the appellant to provide documentation in support of his request for an accommodation for that examination. The record does not contain a Special Notice for the subject examination.

Further, the Center Supervisor's Report on Conduct for this examination reflects that Mr. Hopkins reported to Room A, stating that he was informed that he was to have a reader. However, staff at the examination center did not have notice of this and no reader was available. The Center Supervisor reported that Mr. Hopkins chose to take the examination without ADA accommodations, and that she had the appellant sign the Center Supervisor's Report on Conduct. The Center Supervisor also advises that the appellant was informed that he could request a make-up examination and that she explained the policies governing make-up requests.

CONCLUSION

When a candidate requests a reasonable accommodation or ADA assistance by checking the appropriate box on the application, the Division of Selection Services sends the candidate a Special Accommodations Request form which includes a list of general accommodations used on the front of the form, and a section to be completed by a doctor or child study team member on the back of the form. Accommodations generally provided include readers, markers, interpreters, extra time, separate rooms, special parking, mobility assistance, wheelchair access, special seating, or a personal attendant provided by the candidate. Although Mr. Hopkins requested an accommodation on his original application and submitted documentation

from his physician that specified the details of his condition and the types of accommodations he may need, it is unclear from the record as to why the reader that he had requested was not scheduled or available on the night of the examination. However, it appears that either a decision had not been made when he contacted the Information Center, *or* as requested on the Special Notice provided to candidates when they submit their request for an accommodation, he did not contact the Information Center when he was notified to take the examination so that the accommodation could be scheduled.¹

Further, this matter not only raises issues regarding administration of accommodations for those candidates who request them and administration of the examination at the test site, but also with fashioning a remedy since Mr. Hopkins participated in the examination. On the one hand, Mr. Hopkins agreed to participate in the subject examination notwithstanding the fact that staff at the examination center did not have notice that they needed to provide a reader and that no reader was available that night to accommodate him. He even signed the Center Supervisor's Report acknowledging that he agreed to take the test without the benefit of a reader. On the other hand, six weeks after the examination and upon receipt of his failing score, Mr. Hopkins appeals the fact that a reader was not provided and felt pressured into making a decision on the night of the examination because he did not want to lose out on the opportunity for advancement.

At the outset, it is noted that *N.J.A.C.* 4A:4-6.4(c) states that an examination candidate wishing to challenge *the manner in which the examination was administered* may file an appeal in writing at the examination site on the day of the examination. This would include raising the issue of lack of an accommodation at the examination site on the day of the examination. Generally, all candidates for examinations are provided with an informational flyer called "Taking A Department of Personnel Examination" that specifically informs them of the need to appeal administration issues, including how the examination is conducted, at the examination center. The monitor instructs all candidates to read this information flyer before the start of the test. Indeed, the Appellate Division of Superior Court has noted that "the obvious intent of this 'same-day' appeal process is to immediately identify, address and remedy any deficiencies in the manner in which the competitive examination is being administered." *See In*

¹ The Special Notice sent to applicants who request accommodation informs candidates that "[i]t is your responsibility to notify the Department of Personnel (DOP) in advance each time you file an application" and that the candidate must contact the DOP "once you are notified to take the examination in order to receive the requested accommodation." The issue of this information will be discussed later in this decision.

the Matter of Kimberlee L. Abate et al., Docket No. A-4760-01T3 (App. Div. August 18, 2003).

The DOP strives to provide reasonable accommodations to allow persons with disabilities to participate in the examination process. Unfortunately, situations occur, such as the examination center not being advised that Mr. Hopkins needed a reader, that require a candidate to make a difficult decision at the test center as to whether he/she will participate in the examination. In this specific instance, the Center Supervisor did everything she could to remedy the situation at the examination center by explaining the policies for a make-up request and, since the appellant decided to take the examination without the requested assistance, having him acknowledge that he chose to participate in the test.² Moreover, according to his appeal statements, the Center Supervisor even attempted to contact the DOP to obtain information on his situation since there was no data at the test site, but no information was available since it was after 6:00 p.m. As such, given that the Center Supervisor did not have any data surrounding Mr. Hopkins' situation, she properly advised Mr. Hopkins of his available options. In this regard, it is noted that staff at an examination center cannot guarantee that a petition for a make-up examination will ultimately be approved. Especially in this circumstance, given the unfortunate lack of information at the test site, the Center Supervisor provided the best possible options given the information she had available.

Although Mr. Hopkins did not technically file a timely administration appeal of this issue, equitable relief is warranted in this case. It is not disputed in the record that Mr. Hopkins requested a reader, or that the appellant reported his need for a reader to the Center Supervisor, or that the medical documentation he submitted would have entitled him to a reader. In *In the Matter of Benjamin Della Pietro Jr.* (MSB, decided August 12, 2003), the Board determined that requiring candidates to call when they are scheduled to take the test in order to request assistance after they have provided the required documentation is unreasonable. The Board specifically noted that candidates should be notified whether or not their documentation has met the standards for ADA assistance and provide the requested assistance when the examination is scheduled, without requiring the candidate to be responsible for reminding staff of an upcoming examination for which they need assistance. Clearly, the DOP is in the best position to know when an examination will be scheduled, who will be participating, and who is in need of accommodation. Thus, as noted in *Della Pietro*, it is

² The Center Supervisor's Report on Conduct specifically notes "Richard Hopkins reported to Rm. A saying that he was instructed that he was to have a reader. We had no notice of this and no reader available. Mr. Hopkins chose to take the exam without ADA accommodations." Mr. Hopkins signed and dated this statement February 19, 2004.

unreasonable to require the candidate to call when the test is scheduled in order to receive a requested accommodation.

While the appellant in *Della Pietro* chose not to take the examination and was not exposed to the test material since a reader was not available, the fact that Mr. Hopkins participated in the examination should not preclude him being provided an alternate form of the test. However, given that an alternate form of the examination will not be the same test, it should match the content specifications of the original examination as closely as possible. Thus, since there will be different test questions from those included on the original examination, in order to take the make-up that will be given to Mr. Hopkins, he must agree that he will accept the make-up as a valid substitute for his original examination. If he does not agree to this, no relief can be provided. This is the best relief possible given that Mr. Hopkins was exposed to the previous test materials. To give him the same test would in fact provide him with an unfair advantage over the other candidates. This does not preclude Mr. Hopkins from challenging the answer key or the validity of actual test items.

ORDER

Therefore, it is ordered that this appeal be granted, that an alternate form of the subject examination be developed as soon as possible, that Mr. Hopkins be scheduled to participate in this examination and be provided with a reader, and if he passes the examination, his name be added to the subject employment roster and certifications for retroactive employment consideration. It is also ordered that certification activity for PS040635 and PS040885 be stayed until such time Mr. Hopkins' new examination is scored. Additionally, if Mr. Hopkins achieves a passing score and is reachable on the certification, the matter of a retroactive appointment date should be considered at that time.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.